2004

Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense

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In recent years commentators have criticized the American legal system for its unresponsiveness to claims of self-defense by women who have killed their abusers. Currently, battered woman syndrome (BWS) is the most widely used mechanism to render battered women's self-defense claims judicially cognizable.[1] However, some feminist scholars criticize BWS both for diagnosing battered women[2] who act in their own defense as mentally ill and for ignoring the actual obstacles they face,[3] while more conservative critics argue that BWS is a special standard for women that cloaks ulterior motives.[4] The most damaging criticism, however, is that it is statistically unclear whether BWS has made a difference: while women are three times more likely to be killed by an intimate than to kill an intimate themselves, and far more likely to be acting in self-defense when they do, those women still receive far harsher prison sentences than similarly situated men.[5]

The ongoing debate over BWS has primarily focused on the *temporal* factor of imminence. Although harm may not be imminent by objective temporal measures, disagreement exists as to whether battered women's subjective perceptions of imminent harm can be deemed reasonable.[6] If disagreement about temporal imminence were

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1 See Paris De Soto, *Feminists Negotiate the Judicial Branch: Battered Woman's Syndrome*, in Cynthia R. Daniels, ed, *Feminists Negotiate the State: The Politics of Domestic Violence* 53, 54 (University Press of America 1997).

2 The phrase "battered woman" is a generalization. However, women are almost seven times more likely than men to be victims of serious domestic assault, and men are three times more likely to kill their spouses or partners, making it both convenient and fairly accurate to refer to the category of people that this Comment addresses as "battered women." See Kerry Murphy Healey and Christine Smith, *Batterer Programs: What Criminal Justice Agencies Need to Know* 2 (DOJ 1998).

3 See Kristin A. Kelly, *Domestic Violence and the Politics of Privacy* 70–74 (Cornell 2003).

4 See Donald Alexander Downs, *More than Victims: Battered Women, the Syndrome Society, and the Law* 58, 146–47 (Chicago 1996) (claiming that BWS is a form of "advocacy science" and too susceptible to "the problems associated with undue use of the psychology of victimization"); George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* 21 (Free Press 1988) ("Retaliation, as opposed to defense, is a common problem in cases arising from wife battering and domestic violence. The injured wife waits for the first possibility of striking against a distracted or unarmed husband. The man may even be asleep when the wife finally reacts.").

5 See note 60 and accompanying text.

6 This tension is captured by the majority and dissenting opinions in *State v Hundley*, 236

truly at issue, however, one would expect "imminence" to be discussed only in cases where there is no contemporaneous confrontation, making the reasonableness of the perception of imminence a focal point. A recent survey of self-defense cases found exactly the opposite. In practice, imminence is, counterintuitively, more often an issue when there *is* a contemporaneous confrontation, rather than when there is *not* such a confrontation. Thus, "imminence" appears to be serving as a covert proxy for factors other than temporality of threat.[7] The important project of identifying the factors for which imminence is actually standing in has yet to be accomplished in the context of individual self-defense law. However, an articulation of factors beyond imminence that should be assessed has recently been undertaken in the international law of self-defense.[8]

This Comment proposes that the same conceptual factors offered to evaluate "imminence" at the international level should be applied at the individual level. Historically, self-defense in the international context has developed through analogy and reference to an individual's right of self-defense.[9] Currently the standards for self-defense are the same for individuals as for international entities: the danger must be imminent, and the self-defensive force both necessary and proportional.[10] In both contexts, a strict requirement that a threat be tempo-

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Kan 461, 693 P2d 475 (1985). During their ten-year marriage, Carl Hundley had knocked out several of his wife Betty's teeth, "broken her nose at least five times, [ ] threatened to cut her eyeballs out and her head off, . . . kicked [her] down the stairs on numerous occasions, . . . repeatedly broken her ribs," and sent her into diabetic comas by replacing her insulin with water, all of which entailed police involvement and hospitalization on multiple occasions. Id at 475–76. Betty finally fled to a motel, where Carl broke into her room, physically and sexually brutalized her, and then told her to get him some cigarettes. Betty pulled her gun out of her purse and demanded Carl leave; Carl told her, "You are dead, bitch, now!" and reached for a beer bottle. Betty shot him. Id at 476. The majority opinion held that "[t]he objective test is how a reasonably prudent battered wife" would perceive an imminent threat. Id at 479. The dissent disagreed, failing to see anything objectively reasonable about Betty's perception of imminence since, had she left the hotel room, she "would have had a five minute head start." Id at 481 (MacFarland dissenting).

7 See V.F. Nourse, *Self-Defense and Subjectivity*, 68 U Chi L Rev 1235, 1239 (2001) ("[I]f there is a problem with the law of criminal defenses today, it is not with syndromes or subjectivity, but with a criminal law that purports to be neutral and precise but remains full of contested meanings.").

8 See, for example, John Yoo, *Using Force*, 71 U Chi L Rev 729, 751–61 (2004); John Yoo, *International Law and the War in Iraq*, 97 Am J Intl L 563, 575 (2003).

9 See Yoram Dinstein, *War, Aggression and Self-Defence* 160 (Cambridge 3d ed 2001) ("The legal notion of self-defence has its roots in interpersonal relations, and has been sanctified in domestic legal systems since time immemorial. From the dawn of international law, writers sought to apply this concept to inter-State relations.").

10 Compare Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *Right v. Might: International Law and the Use of Force* 37, 45 (Council on Foreign Relations 2d ed 1991) ("[T]he right to self-defense . . . is subject to limitations of 'necessity' and 'proportionality,' but that self-defense includes a right both to repel the armed attack and to take the war to the aggressor state in order effectively to terminate the attack and prevent recurrence."), with *Black's Law Diction-*

rally "imminent" renders illegal any action taken in preemptive, or anticipatory, self-defense.[11] With the Bush administration's adoption of a new policy of preemptive self-defense,[12] the three factors (beyond temporality) that have been articulated as defining imminence are probability, availability of alternative recourses, and magnitude of harm.[13] In keeping with the traditionally analogous relationship between the international and domestic concepts, these factors should be relevant to individual self-defense as well.

Applying these factors in the individual context would address many of the concerns regarding BWS. First, it would identify the elements that are already implicitly assessed by "imminence" and assign them their appropriate legal weight—rather than leaving it to the unarticulated prejudices of judges and juries. Second, relocating battered women's actions as part of a legally recognized experience, rather than as mental illness, would address both feminist criticisms and conservative concerns by replacing an amorphous syndrome with more accessible, and objective, factors. Third, the use of these objective factors may enable a greater number of battered women who kill their abusers to receive self-defense jury instructions and have their actions deemed justifiable self-defense.

A brief survey of the international and individual contexts suggests the desirability of employing the self-defense factors proposed in the international arena in the domestic law of self-defense. Thus, Part I will sketch the development and current doctrine of self-defense in the individual context before focusing on the specific challenges posed by the experiences of battered women to the current requirement of imminence. Part II will trace the parallel development of self-defense doctrine at the international level before outlining the specific doctrinal challenges posed by new threats. Part III will compare the international and domestic theories of self-defense, and argue that the ad-

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ary 1390 (West 8th ed 2004) ("[A] person is justified in using a reasonable amount of force in self-defense if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger.").

11 See George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U Pitt L Rev 553, 557 (1996) ("Preemptive strikes are illegal in international law as they are illegal internally in every legal system of the world.").

12 See *The National Security Strategy of the United States of America* 25 (2002), online at http://www.whitehouse.gov/nsc/nss.pdf (visited Aug 23, 2004) ("We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. . . . To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.").

13 See Yoo, 97 Am J Intl L at 575 (cited in note 8); Yoo, 71 U Chi L Rev at 755 (cited in note 8). Although Yoo describes the factors as "expand[ing] the concept of imminence," 71 U Chi L Rev at 755, it is more accurate to describe them as being in addition to imminence. Imminence *is* a temporal concept; this Comment posits that the temporal proximity of a threat may not be the only reliable measurement of necessity, and thus that additional factors are required for judging the necessity of defending against a threat.

ditional factors beyond temporal imminence offered in the international arena to delineate an appropriate definition of preemptive self-defense—probability, alternative recourses, and magnitude of harm—can sensibly be imported to domestic self-defense law. Finally, Part IV will apply these factors to a paradigmatic, controversial case of a battered woman who killed her sleeping abuser and was subsequently denied a self-defense jury instruction.[14] Even in this very difficult case, where traditionally strict temporal imminence is lacking, evaluating the additional factors—probability of harm posed by the abuser, lack of alternative recourses, and magnitude of harm—can recast the defendant's actions as legally justifiable anticipatory self-defense.

I. INDIVIDUAL LAW OF SELF-DEFENSE

The traditionally strict requirement of imminence in self-defense law has come under scrutiny in light of battered women's experiences. The early development of self-defense law was formulated to address specific, potentially fatal, confrontations, none of which included threats faced in long-term violent relationships. This conceptual gap does not require that imminence be discarded as a measurement of necessary self-defensive force; it does, however, suggest that a lack of strict temporal imminence should not be fatal to a self-defense claim. To demonstrate the desirability of including considerations beyond temporal imminence, it is first necessary to describe self-defense law's early development, outline subsequent arguments for change in the context of domestic violence, and highlight the ways in which BWS has failed to overcome the obstacles posed by traditional self-defense law.

A. Traditional Individual Self-Defense Law

Grounded in natural law,[15] the modern right of self-defense in Anglo-American law became firmly entrenched in early England.[16]

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14 See *State v Norman*, 324 NC 253, 378 SE2d 8 (1989).

15 See Thomas Aquinas, *Summa Theologica* I-II, Q 96, Art 6 (Benziger 1947) ("If [ ] the peril be so sudden as not to allow of the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law."). Hobbes and Locke further enshrined this "conception of a natural right to self-defense," maintaining that "the very purpose of civil society is to institutionalize the natural right of individuals to secure their protection from others." Mary Sigler, *Contradiction, Coherence and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 Am Crim L Rev 1151, 1155 n 22 (2003).

16 See, for example, William Blackstone, 3 *Commentaries on the Laws of England* *4 (Chicago 1979):

> Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. . . . [B]ut care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

The law of self-defense for individuals developed around two scenarios: either an individual is feloniously attacked by another, in what could be called the "stranger in a dark alley" scenario, or an individual becomes involved in a "chance-medley," in what could be called the "bar fight" scenario.[17] In both cases either the attack by the stranger or the fact of mutual combat authorized the person acting in self-defense to respond to the extent that he felt he was in "imminent" danger, so long as he only deployed force that was necessary and proportionate to the attack.[18]

Women's experiences with domestic violence were simply not envisioned when the legal criteria for self-defense were developed.[19] Rather, the doctrine of coverture allowed husbands to discipline their wives physically,[20] and women were specifically forbidden to defend themselves against such abuse.[21] As Blackstone memorably described the law:

> [I]f the baron kills his feme it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason . . . the sentence of women was to be drawn and burnt alive.[22]

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17 Id at *183–84 (noting that there are two main "species of self-defense": self-defense "calculated to hinder the perpetration of a capital crime" and self-defense "whereby a man may protect himself from an assault . . . in the course of a sudden brawl or quarrel").

18 See text accompanying note 10.

19 Clearly, neither of the traditional scenarios contemplates the two combatants leaving the bar fight or robbery in an alley and going home to raise children together. See Cynthia K. Gillespie, *Justifiable Homicide: Battered Women, Self-Defense and the Law* 4–8, 38 (Ohio State 1989) (arguing that the law of self-defense was developed with men in mind and does not take into account the physical and other differences between men and women).

20 See Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L J 2117, 2121–30 (1996) (detailing the common law doctrine of coverture, which legally entitled a man to physically chastise his wife). See also Dianne Post, *Why Marriage Should Be Abolished*, 18 Women's Rts L Rep 283, 294 (1997) (discussing, in addition to coverture, the legal parallels between marriage and slavery).

21 See William Blackstone, 4 *Commentaries on the Laws of England* *75 (Chicago 1979):

> [T]reason . . . denote[s] . . . that accumulation of guilt which arises whenever an inferior . . . so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of [ ] his superior or lord. . . . [T]herefore for a wife to kill her lord or husband . . . being [a] breach[] of the lower allegiance, of private and domestic faith, [is] denominated *petit* treason[].

22 William M. Blackstone, 1 *Commentaries* *418 n 103 (Welsh & Co 1898), quoted in Elizabeth M. Schneider, *Resistance to Equality*, 57 U Pitt L Rev 477, 484 n 21 (1996). A Virginia judge explained, "Other offences are injurious to Private Persons only, but this is a Public Mischief, and often strikes at the Root of all Civil Government." Hugh F. Rankin, *Criminal Trial Proceedings in*

Although the doctrines of coverture and *petit* treason eventually fell into disuse, the law not only disregarded women's need to protect themselves in their own homes but also helped to create the conditions from which they would need protection.[23]

The women's movement of the 1960s and 1970s, and its "discovery" of domestic violence,[24] challenged self-defense law's nonresponsiveness to the situation in which women were most likely to confront violence.[25] If a battered woman acted in self-defense during a "lull" in a pattern of ongoing violence, and thus was seen as not facing an imminent threat, the jury was prohibited from receiving self-defense instructions. This approach excluded from consideration all history of abuse.[26] Even when evidence of past abuse was admitted at trial, juries and judges tended to view the requirements of "duty to retreat" and "imminence" as an invitation to ask what steps the woman could have taken to leave the relationship prior to the fatal encounter.[27] This ap-

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the General Court of Colonial Virginia 222 (Williamsburg 1965), cited in Ann Jones, *Women Who Kill* 36 (Beacon 1996). The last reported case of a woman killing her husband and being burned at the stake in the United States was in 1731. See Jones, *Women Who Kill* at 36.

23 "[B]attering of women by husbands, ex-husbands, and lovers remains the single largest cause of injury to women in the United States today," and "[f]emale homicide victims [are] more than nine times more likely to have been killed by a husband, ex-husband, or boyfriend than male homicide victims [are] to have been killed by their wife, ex-wife, or girlfriend." Siegel, 105 Yale L J at 2171–72 (cited in note 20) (internal citations omitted). Estimates by the Journal of the American Medical Association place the number of women "believed to be battered every year by their partners [at] approximately four million." Id at 2173.

24 The first children's shelters were founded at the turn of the twentieth century and based on the model of animal shelters; in contrast, the first U.S. battered women's shelter opened in St. Paul, Minnesota in 1974. See Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy against Family Violence from Colonial Times to the Present* 40–60 (Oxford 1987). The U.S. still has three times as many animal shelters as battered women's shelters. Staff of Senate Committee on the Judiciary, 102d Cong, 2d Sess, *Violence against Women: A Week in the Life of America* 26 (GPO 1992).

25 The groundwork for these legal challenges was laid in earlier cases that addressed women's experiences with self-defense law but did not involve abusive relationships. For example, *State v Wanrow*, 88 Wash 2d 221, 559 P2d 548 (1977), recognized that the concept of "proportional" force must take into account the strength differential that might exist in an encounter between a woman and a man.

26 See, for example, *State v Norman*, 324 NC 253, 378 SE2d 8, 13 (1989) (denying a self-defense instruction when a battered woman was not faced with the "instantaneous choice between killing her husband or being killed or seriously injured"); *People v Aris*, 215 Cal App 3d 1178, 264 Cal Rptr 167 (1989) (finding that a battered woman did not face immediate peril when she shot her sleeping husband); *State v Gallegos*, 104 NM 247, 719 P2d 1268 (1986) (denying a self-defense instruction because a battered woman's husband lying on a bed presented no immediate threat); *State v Allery*, 101 Wash 2d 591, 682 P2d 312 (1984) (denying a self-defense instruction because a battered woman's husband lying on a couch presented no immediate threat).

27 This was true even for the majority of states without the duty-to-retreat rule. Thus, regardless of how dangerous the situation faced by the battered woman at the moment of confrontation, the rationale was that she would have left the relationship a long time earlier if she had really feared death. See, for example, *Commonwealth v Watson*, 494 Pa 467, 431 A2d 949 (1981) (describing, and reversing, a trial court's decision that a woman who was being choked by her husband at the time of the shooting was not in imminent danger because past abuse had not in-

proach conflicts with "traditional" self-defense law, where one does not forfeit the right to self-defense by failing to avoid a known threat.[28] Yet the "requirements of immediate danger, necessary force, reasonable belief and the duty to retreat present[ed] almost insurmountable barriers to a self-defense claim in the wife-battery situation."[29]

Feminists' initial response to the failure of judges and legislatures to recognize battered women's actions as self-defense was to fight for the recognition of battered woman syndrome. Pioneered by psychologist Lenore Walker,[30] BWS, a subspecies of posttraumatic stress disorder (PTSD), was designed to address the gap between society's stereotypes and battered women's experiences. Judges and juries tended to interpret a woman's decision to stay in an abusive relationship as an indication that she was not afraid for her life, or that she invited the abuse. BWS provided an alternative explanation. Walker explained that through a "cycle of violence,"[31] a woman came to believe herself powerless to leave the relationship, a condition known as "learned helplessness."[32] A woman stayed in the relationship not because she was masochistic, or because the violence was not terrifying, but because she was psychologically trapped.[33]

Expert testimony on the syndrome was first accepted in *Ibn-Tamas v United States*,[34] where the court explained that BWS would be useful in assessing a battered woman's claim of self-defense.[35] By the mid-1990s, expert testimony on BWS had been accepted in some form,

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volved potentially deadly force and because her husband had no weapon at the time of the shooting). *Watson* is discussed at length in Nourse, 68 U Chi L Rev at 1246–48 (cited in note 7).

28 See, for example, *State v Bristol*, 53 Wyo 304, 84 P2d 757, 765 (1938) (holding that the defendant had no duty to avoid entering a bar where he knew his adversary, who had threatened to attack him, was drinking).

29 Nanci Koser Wilson, *Gendered Interaction in Criminal Homicide*, in Anna Victoria Wilson, ed, *Homicide: The Victim/Offender Connection* 43, 50 (Anderson 1993).

30 Lenore E. Walker, *The Battered Woman* (Harper 1979). See also Lenore E. Walker, *The Battered Woman Syndrome* (Springer 1984); Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J L, Ethics, & Pub Policy 321 (1992).

31 Three phases constitute this "cycle": (1) the "tension building" phase, (2) an "acute battering incident," and (3) a "loving contrition" stage. Walker, 6 Notre Dame J L, Ethics, & Pub Policy at 330 (cited in note 30).

32 Id at 330–32. Famously, this condition was based on a series of experiments that Martin Seligman conducted on dogs. When caged dogs were repeatedly subjected to electric shocks, at some point they stopped trying to escape from the cage, lay down, and passively accepted the electrical shocks. Martin E.P. Seligman, et al, *Alleviation of Learned Helplessness in the Dog*, 73 J Abnormal Psychology 256 (1968); Martin E.P. Seligman, *Helplessness: On Depression, Development, and Death* (W.H. Freeman 1975).

33 See Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts L Rep 195, 211 (1986) ("A battered woman who has been the victim of abuse for many years and has survived it before must credibly explain why it was necessary to act on that occasion."); Elizabeth Schneider, *Battered Women & Feminist Lawmaking* 117, 135 (Yale 2000).

34 407 A2d 626 (DC App 1979).

35 Id at 635.

whether through precedent or statute, in all fifty states.[36] Thus, if an expert witness testifies that a woman who killed her abuser was suffering from BWS, and a judge accepts that finding, the self-defense instructions and evidence of abuse that might otherwise have been excluded are allowed into the trial.[37] This testimony was seen as having the further benefit of challenging the biases that the jury or judge might have against victims of domestic violence.[38]

B. Criticism of Battered Woman Syndrome

Although BWS seemed to solve the evidentiary and jury instruction problems,[39] some of its strongest critics have been feminists, who point to both pragmatic and theoretical concerns.[40] First, there are practical problems with BWS. Although it is logical that those in long-term, physically violent relationships might suffer from a form of PTSD,[41] the extension of PTSD to a theory of "learned helplessness" is less certain.[42] Furthermore, creating an identity category into which women must fit in order to claim BWS presents its own problems. Certain kinds of women look more "helpless" than others, and those who find themselves less likely to fit into the category tend to be non-

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36 See Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 Wis Women's L J 75 (1996).

37 For example, in *State v Kelly*, the court explained that BWS evidence may "aid the jury in understanding the reasonableness of [the defendant's] apprehension of imminent death or bodily injury . . . [and] is offered to aid the trier of fact in understanding the evidence and determining a fact in issue." 102 Wash 2d 188, 685 P2d 564, 570 (1984).

38 Id. See also *State v Hodges*, 239 Kan 63, 716 P2d 563, 567 (1986):

> [BWS helps to] dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any "common sense" conclusions by the jury that if the beatings were really that bad the woman would have left her husband much earlier.

39 It should be noted that a judicial finding that a defendant suffers from BWS does not amount to a "battered woman's defense." BWS simply allows the defendant's jury to receive instructions on self-defense, which does not guarantee that the jury will so find. See, for example, *People v Saiz*, 923 P2d 197 (Colo App 1995) (allowing a self-defense instruction, which the jury rejected).

40 See, for example, Schneider, *Battered Women & Feminist Lawmaking* at 123 (cited in note 33) ("The use of the term 'battered woman syndrome' has intensified the general confusion about domestic violence and battered women, and has increased the likelihood that the law will be misapplied to battered women when they seek protection in the courts or appear as defendants.").

41 This Comment does not claim that women who are in abusive relationships are not mentally harmed by that experience. Rather, it claims that the mental harm need not entail a finding of mental illness that impairs a woman's ability to accurately assess life-threatening situations.

42 For examples of the challenges to the scientific validity of BWS, see Marilyn McMahon, *Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome*, 6 Psychiatry, Psychology, & L 23 (1999); Robert F. Schopp, Barbara J. Sturgis, and Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse*, 1994 U Ill L Rev 45.

white women,[43] working women, lesbians,[44] and, perhaps most problematic, those who had tried to leave their relationships but eventually killed their abusers.[45]

Second, feminists pointed out that BWS reinforced the familiar tendency to pathologize women's behavior, minimizing what seemed to be the real issues.[46] Obstacles to leaving a violent relationship, beyond a woman's mental state, include economic, social, religious, familial, and legal barriers.[47] Furthermore, those obstacles do not include the now widely documented risk that women are most likely to be killed by their abusers when they attempt to leave the relationship[48]—

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43 See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 Minn L Rev 367 (1996) (discussing how racial stereotypes about African-Americans, Asian Americans, and Latinos influence jurors in self-defense cases); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 Stan L Rev 781 (1994) (outlining how African-Americans tend to be stereotyped as aggressive, which, in the BWS context, hinders a diagnosis of "helplessness").

44 See Mary Eaton, *Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence*, in Martha Albertson Fineman and Roxanne Mykitiuk, eds, *The Public Nature of Private Violence: The Discovery of Domestic Abuse* 195 (Routledge 1994) (profiling intralesbian violence within the context of feminist theory).

45 This has been called the "victimization-agency dichotomy," and it poses the following bind:

> A battered woman supposedly cannot be victimized if she has acted in any way that suggests agency or if she is a survivor; in contrast, if she is a victim, she cannot be considered reasonable.... But women who are battered, and particularly battered women who kill, are simultaneously victims and agents: they are abused but they also act to protect themselves.

Schneider, *Battered Women and Feminist Lawmaking* at 120 (cited in note 33). Thus, the theory of learned helplessness flies in the face of a woman's actual efforts to survive the relationship. Only a small percentage of the cases where women have ended up killing their abusers actually occurred in a "nonconfrontational" setting. See Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U Pa L Rev 379, 397 (1991). In one study, four out of five victims of intimate offender violence attempted to resist the assault; either they passively resisted by trying to get help, threatening, arguing, or using evasive action, or—half as often—they actively resisted, using a weapon or fighting back. Caroline Wolf Harlow, *Female Victims of Violent Crime* 6 (DOJ 1991). It has been pointed out that if "learned helplessness" were taken to its logical conclusion, battered women who hire third parties to kill their abusers would present the strongest case for BWS. See Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 Soc Phil & Policy 105, 119–20 (Spring 1990). This scenario has never been accepted by a court as self-defense. See, for example, *People v Yaklich*, 833 P2d 758 (Colo App 1991).

46 See, for example, Anne M. Coughlin, *Excusing Women*, 82 Cal L Rev 1 (1994); Schneider, 9 Women's Rts L Rep at 220 (cited in note 33).

47 For example, fears of economic repercussions are well founded, as illustrated by the fact that almost 50 percent of homeless women and children are refugees from domestic violence. Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J L & Policy 237, 244–45 (1994) (noting that approximately 31 percent of battered women housed in New York City shelters returned to their batterers "primarily because they could not locate longer-term housing"). See also Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 Clearinghouse Rev 420, 421 (1991).

48 See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich L Rev 1, 6–7 (1991) (defining "separation assault" as the increased risk of violence when a woman attempts to leave an abusive relationship).

restraining orders notwithstanding. Many critics concluded that focusing on battered women's mental health, and requiring them to hide in shelters, change identities, move states, and live like fugitives has not only missed the fundamental problem of domestic violence but also created new unforeseen legal obstacles for battered women in areas such as child custody, employment, welfare, immigration, and housing.[49]

Battered woman syndrome was also challenged from a more conservative perspective, with critics heralding its acceptance as "an open season on men" and the deterioration of our system of objective justice.[50] Underlying this criticism was the suspicion that BWS masks ulterior, illegal motives such as retaliation, cloaking them in the respectable claim of self-defense.[51] They also charged that BWS created a "special" standard for women[52] that would generate further "special" standards for other interest groups.[53] This criticism has focused on the concept of "reasonableness" and whether battered women's actions should be judged under a subjective "reasonable battered woman" standard or under an objective "reasonable person" standard.[54] This debate, although of questionable utility,[55] was predictable given that battered women's right to self-defense had been pinned on the notion that they were suffering from a mental illness, making it difficult to classify their acts as "reasonable."[56]

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49 See Kelly, *Domestic Violence* at 74–77 (cited in note 3); Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 Wash U J L & Policy 157, 169–90 (2003) (outlining the difficulties that a diagnosis of BWS can entail, including adverse custody decisions, being denied insurance, and welfare and immigration consequences).

50 See Loraine P. Eber, Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 Hastings L J 895, 930 & n 190 (1981) (citing various commentators' predictions that a battered woman's defense would lead to an "open season on men").

51 See note 4.

52 It has been argued that the existence of this special standard is harmful in that it condescendingly treats battered women as victims. See Downs, *More than Victims* at 3–4 (cited in note 4) (finding that once syndrome status has been achieved, no lines are drawn between justified and unjustified acts); Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 Loyola L Rev 81, 83 (2001) ("Not only do juries refuse to buy the story battered woman syndrome presents, but they cast women in a demeaning light, a light that does not reflect reality.").

53 See, for example, Alan M. Dershowitz, *The Abuse Excuse and Other Cop-Outs, Sob Stories and Evasions of Responsibility* (Little, Brown 1994); Joelle Anne Moreno, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U Pa L Rev 1281 (1989).

54 See Schneider, *Battered Women and Feminist Lawmaking* at 138–39 (cited in note 33) ("The objective standard—the traditional 'reasonable-man standard'—looked at reasonableness from the perspective of the hypothetical reasonable man, while the subjective standard regarded reasonableness from the individual's own perspective."). See also Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and Its Processes* 770–73 (Aspen 7th ed 2001).

55 See Nourse, 68 U Chi L Rev at 1299 (cited in note 7) ("The discourse of subjectivity and objectivity says most not about the law of self-defense or any other rule of criminal law, but about the politics of criminal law scholarship.").

56 See Charles Patrick Ewing, *Battered Women Who Kill: Psychological Self-Defense as Legal*

Perhaps the most devastating critique of BWS, however, comes from objective evaluations of its actual impact on the legal system. After thirty years, BWS's greatest contribution has arguably been its function of raising awareness of domestic violence issues. However, this increased awareness has not resulted in a meaningful reduction in the rate at which women are killed by their partners,[57] nor has it made the legal system any more responsive to the self-defense claims of battered women.[58] The primary situation in which women might need to kill in self-defense is during a confrontation with an intimate, as women are "more likely to be killed by an intimate partner than by a total of all other categories of assailants," and are three times more likely to be killed by an intimate than to kill an intimate themselves.[59] However, not only do women who commit homicide "generally receive longer sentences than men who kill," but "[b]attered women who kill tend to receive even longer sentences" than nonbattered women, with one survey showing that 83.7 percent of battered women "received sentences ranging from twenty-five years to life."[60] Combined with the fact that "only a small percentage of women accused of killing their batterers are acquitted at trial"[61]—with between 72 and 80

Justification 46–50 (Lexington 1987). This debate did, however, finally produce the step of semantic progress that recently changed the wording of self-defense laws around the country from "reasonable man" to "reasonable person."

57 See Elizabeth Leonard, *Convicted Survivors: The Imprisonment of Battered Women* 8 (SUNY 2002) (noting that the number of women killed by intimates was stable between 1976 and 1993, down 23 percent between 1993 and 1997, and up 8 percent the following year).

58 See note 60 and accompanying text.

59 This holds true for nonlethal attacks as well; on average, there are "more than 960,000 violent victimizations of women age 12 and older by an intimate" each year that are serious enough to be reported to law enforcement or for hospital treatment to be sought. Lawrence A. Greenfield, et al, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* (DOJ 1998), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf (visited Aug 23, 2004). The National Organization for Women estimates the number at over 2 million. Donna Hazley, *Women's Prison Population Growing*, National NOW Times (Summer 2001), online at http://www.now.org/nnt/summer-2001/prisons.html (visited Aug 23, 2004).

60 Schneider, *Battered Women and Feminist Lawmaking* at 280–81 nn 114–15 (cited in note 33). These statistics are not just based on women who simply *allege* that the man they killed abused them. In one women's prison, for example, 40 percent of inmates incarcerated for murder or manslaughter had killed a partner who *repeatedly* assaulted them; and these women had sought police protection at least *five* times before resorting to homicide. *WAC STATS: The Facts about Women* 57 (Women's Action Coalition 1992), citing statistics from the National Commission for Jail Reform. In localities where shelters and services have been made available to battered women, however, the number of men killed by women has declined markedly. See Greenfield, et al, *Violence by Intimates* at v (cited in note 59) ("The percentage of female murder victims killed by intimates has remained at about 30% since 1976. There has been a sharp decrease in the rate of intimate murder of men."). Sue Ostoff, the cofounder of the National Clearinghouse for the Defense of Battered Women, observed: "I went into this work to help women.... Now it seems like we've all been working very hard all these years to save the lives of *men*. That's not what I had in mind." Jones, *Women Who Kill* at 347 (cited in note 22).

61 Schneider, *Battered Women and Feminist Lawmaking* at 280–81 nn 114–15.

percent taking a plea bargain or being convicted—the result is that the vast majority of women who are in prison for first- or second-degree murder are incarcerated for killing an abusive partner.[62] For all practical purposes, one of the only real threats of murder faced by women, and thus one of the only situations in which women kill in self-defense, is not accommodated by the current standard of self-defense, BWS notwithstanding.[63]

C. Reassessment of Imminence

After several decades of debate on theoretical aspects of self-defense such as subjective versus objective reasonableness, imminence versus immediacy, and justification versus excuse, the requirement of imminence has finally been subjected to more rigorous analysis. Importantly, commentators have recognized that "imminence" is a political term,[64] rather than a moral argument about the justification of force, which is more accurately captured by the requirement of "necessity."[65] Imminence is therefore a political judgment that the temporality of the threat is the best indicator of whether self-defensive force is necessary.

If courts interpreted imminence to mean only a threat that was temporally proximate, there should be little to no discussion of the defendant's perception of imminence in cases where there is a contemporaneous confrontation. During a confrontation, the threat is—by definition—temporally imminent. However, a recent comprehensive survey of self-defense cases over the last twenty years found that, counterintuitively, the "vast majority of imminence-relevant cases" were solidly confrontational and did not deal with imminence as a

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62 Leonard, *Convicted Survivors* at 37–38 (cited in note 57).

63 There seems to be resignation on this point by many who concede that BWS has not been successful but that it is better than reverting to completely ignoring battered women's experiences in self-defense cases. See, for example, De Soto, *Feminists Negotiate the Judicial Branch* at 64 (cited in note 1) ("Until legal definitions are expanded to correspond to the realities of both men and women, however, using BWS as a defense is probably a battered woman's best bet.").

64 See, for example, Fletcher, 57 U Pitt L Rev at 570 (cited in note 11):

> The requirement [of imminence] properly falls into the domain of political rather than moral theory. The issue is the proper allocation of authority between the state and the citizen. When the requirement is not met, when individuals engage in preemptive attacks against suspected future aggressors, we fault them on political grounds. They exceed their authority as citizens; they take "the law into their own hands." Precisely because the issue is political rather than moral, the requirement must be both objective and public. There must be a signal to the community that this is an incident in which the law ceases to protect, that the individual must secure his or her own safety.

65 See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 NC L Rev 371, 380 (1993) (stating that "imminence has no significance independent of the notion of necessity"—it is only a "translator of the underlying principle of necessity").

temporal concept at all.[66] Rather, the case law showed that "imminence has many meanings" and was far more frequently operating "as a proxy for any number of other self-defense factors—for example, strength of threat, retreat, proportionality, and aggression."[67] This phenomenon was especially noticeable in battered women's cases where, although the opinions extensively discussed imminence, "almost three quarters . . . raised confrontational claims."[68]

The observation that values other than temporality are often imported through the concept of imminence is not unique to battered woman cases. The value judgments covertly made in battered woman cases are also made in mutual combat "bar fight" cases in which temporality should similarly be a nonissue because of the contemporaneous confrontation. With the element of temporality met, the imminence inquiry enables the factfinder to allocate blame by determining an "initial aggressor" or imposing a "pre-retreat" rule. However, in both cases the inquiry is inappropriate: no jurisdictions require "pre-retreat" to avoid a confrontation. The common law of self-defense protects "the freedom to move."[69] Furthermore, even in these two situations, "[i]t is one thing for jurors or judges to confuse imminence with 'leaving the confrontation'; it is another to confuse it with 'leaving the relationship.'"[70]

If imminence in practice serves "as a proxy for other self-defense factors—questions of motive and emotion and retreat,"[71] it is necessary to address those factors, and the underlying value judgments, directly. If jury instructions and statutes articulated the specific factors that we actually accept in practice as defining "necessary" self-defense, they would allow self-defensive actions that look more anticipatory,

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66 Nourse, 68 U Chi L Rev at 1253 (cited in note 7).

67 Id at 1236.

68 Id at 1253. Not surprisingly, "battering claims . . . heavily dominated the small nonconfrontational universe." Id at 1254.

69 Id at 1284 & n 237 (noting that a "pre-retreat rule . . . has never been a part of standard self-defense law"), citing Andrew Ashworth, *Principles of Criminal Law* 119 (Clarendon 1992). Nourse further points out that the "man who goes for the fiftieth time to the violent gang-bar is not deprived of his self-defense claim because he 'should have left' before the violence erupted." 68 U Chi L Rev at 1284. In the battered woman context, very few scholars have urged "that we should ask of women why they did not leave," with some notable exceptions. Id. See Schulhofer, 7 Soc Phil & Policy at 128–29 (cited in note 45) ("[W]e cannot forgo all punishment if the circumstances afforded the [abused] woman some alternative. . . . Conviction and some punishment remain appropriate so long as the social and economic circumstances . . . did afford some reasonable alternative to the use of deadly force.").

70 Nourse, 68 U Chi L Rev at 1284.

71 Id at 1267 (suggesting that "scholars of self-defense should be worried not only that imminence is sloppy but also that . . . despite the conventional wisdom that the elements of self-defense are well-established and coherent, in fact the law of imminence reflects deep conflicts in the law of self-defense").

but retain the requisite level of necessity.[72] In the international arena there has been an effort to undertake just such a project, outlining the factors that should define self-defense, when temporal imminence alone is insufficient to ascertain necessity.

II. INTERNATIONAL LAW OF SELF-DEFENSE

In recent years, there has been increasing discussion of what role, if any, anticipatory self-defense should play at the international level. To adequately assess the factors that have been proposed to relax the traditionally strict requirement of temporal imminence in the international arena, it is first necessary to give a brief overview of traditional self-defense law, as codified by the United Nations Charter, before addressing the arguments advanced for a modification in the law to accommodate changed circumstances.

A. Traditional International Self-Defense Law

Prior to the adoption of the UN Charter, the concept of *jus ad bellum*—or a just use of force or recourse to war—had developed over several thousand years.[73] World War I brought the inadequacies of existing international dispute mechanisms into dramatic relief, and the resulting League of Nations and Kellogg-Briand Pact were unable to prevent World War II.[74] However, "the idea of prohibiting aggressive war," with exceptions only for "self-defense and wars authorized by the League of Nations," had been "indelibly planted in the minds of modern world leaders."[75] Against this backdrop, the UN Charter became the central route for the resort to force.

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72 This does not mean that "temporality" is irrelevant; it is clearly a strong indicator of necessity. However, if "temporality" and "imminence" are not treated synonymously in practice, then what is actually being captured by "imminence" should be clearly spelled out.

73 Early Greek philosophers, natural law theorists such as Aquinas, and secular theorists of just war such as Grotius developed this concept through analogy and reference to an individual's right to self-defense. See, for example, Aristotle, *The Politics* 319 (Chicago 1984) (Carnes Lord, trans); Joan D. Tooke, *The Just War in Aquinas and Grotius* 21–29, 172–80, 195–230 (Society for Promoting Christian Knowledge 1965). In 1648, the Peace of Westphalia codified principles of state sovereignty that, although allowing that all states had a *compétence de guerre* (or right to "institute a war at any time to vindicate their rights"), also provided for the important development of a positivist system of international law through an ever-increasing structure of treaties and dispute resolution mechanisms. Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* 15, 17 (Routledge 1993). Thus, prior to World War I, the legal right of states to redress injuries through reprisal had been established in an arbitral decision involving Germany and Portugal, while the legal requirements for self-defense were enumerated in official correspondence between England and the United States. See Marjorie M. Whiteman, *Digest of International Law* § 4 at 148, 149 (GPO 1971) (discussing the *Naulilaa* case); John Bassett Moore, 2 *A Digest of International Law* § 217 at 409, 412 (GPO 1906) (discussing the *Caroline* doctrine).

74 See Arend and Beck, *International Law and the Use of Force* at 24–25 (cited in note 73).

75 Id.

As in the individual context, the requirements of self-defense in the international arena were set out with a specific scenario in mind. As codified by Article 51 of the UN Charter, one state will attack another, and once the "armed attack" is launched—or imminent—the attacked state can resort to its "inherent right of self-defense."[76] Beyond recognizing that an "armed attack"[77] is closely linked with the definition of "aggression,"[78] standards of self-defense are not explicitly stated, as it is "universally acknowledged that the right of national-defense is bounded by the same intrinsic limitations as the right of personal self-defense."[79] The traditional requirements of necessity, imminence, and proportionality have been reaffirmed on multiple occasions in international venues.[80]

B. Self-Defense Law and Modern Threats

Article 51(1)'s restriction of self-defense to situations of "armed attack" was an understandable solution to the use of force witnessed during World War II.[81] But it did not envision the rapid proliferation of

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[76] UN Charter Article 51 provides an exception to Article 2(4)'s prohibition on the use of force: "Nothing in the present Charter shall impair the inherent right of individual . . . self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." UN Charter Art 51. See also Dinstein, *War, Aggression and Self-Defence* at 161 (cited in note 9) ("In actuality, Article 51 has become the main pillar of the law of self-defence in all its forms, individual as well as collective.").

[77] The stringent requirement of an "armed attack" was used at the insistence of the United States. Although the State Department's legal adviser, Green Hackworth, felt that this "greatly qualified the right of self-defense," Governor Harold Stassen, deputy head of the delegation at San Francisco, insisted: "[T]his was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred." In response to a challenge regarding U.S. "freedom under this provision in case a fleet had started from abroad against an American republic, but had not yet attacked," Governor Stassen replied that "we could not under this provision attack the fleet but we could send a fleet of our own and be ready in case an attack came." Thomas M. Franck, *The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Force without Prior Security Council Authorization?*, 5 Wash U J L & Policy 51, 58–59 (2001), quoting Minutes of the Forty-Eighth Meeting (Executive Session) of the U.S. Delegation, Held at San Francisco, Sunday, May 20, 1945, 12 Noon.

[78] As outlined in the UN Consensus Definition of Aggression (1974) Article 1(1). The definition of "aggression" has been widely debated in its own right and is closely linked with how one defines "self-defense." See, for example, *Report of the Special Committee on the Question of Defining Aggression*, UN GAOR, 25th Sess, Supp No 19 (1970) UN Doc A/8019 47–48, ¶¶ 131–32.

[79] David Rodin, *War and Self-Defense* 110–11 (Oxford 2002). See also Michael Walzer, *Just and Unjust Wars* 58 (Basic 3d ed 2000) ("If states actually do possess rights more or less as individuals do, then it is possible to imagine a society among them more or less like the society of individuals. The comparison of international to civil order is crucial to the theory of aggression.").

[80] See, for example, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, 1986 ICJ 14, 94, 103; *International Military Tribunal (Nuremberg)—Judgments and Sentences*, 41 Am J Intl L 172, 205 (1947) ("[Preventative action] is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation.'") (internal citations omitted).

[81] Most commentators agree that UN Charter Article 51 defines and limits self-defense to

weapons of mass destruction in a world including heavily armed "rogue states" and terrorist organizations, thus leading to increasing discussion of whether Article 51(1)'s restriction should be relaxed to accommodate some form of anticipatory self-defense.

Those in favor of recognizing a right of anticipatory self-defense point to a doctrine of customary international law predating the UN Charter, known as the *Caroline* doctrine.[82] Although usually cited in support of relaxing the imminence requirement, the doctrine's own terms place tight restraints on a state's ability to claim justified self-defense. Not only did the state have to show that the "necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation," but even if necessity was present, the defending state must have done "nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[83] Although there is some uncertainty regarding the extent to which Article 51(1) was meant to supersede rather than incorporate existing customary law, "[w]hat can be said with confidence is that under the Charter, as under general international law," resort to self-defensive force is conditioned upon the strict requirements set forth in the *Caroline* doctrine, which were also "the criterion applied by the Nuremberg Tribunal."[84] Accordingly, actions of self-defense that are more anticipatory in nature have rarely been taken and have usually been condemned.[85]

In the half century since Article 51 codified states' "inherent right to self-defense," commentators have noted that the proliferation of weapons of mass destruction, along with a number of actions that fell short of "armed attacks" but presented genuine dangers to states, have

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cases of armed attack. See, for example, *Report of the International Law Commission on the Work of Its Thirty-Second Session*, UN Doc A/35/10, 122–31 (UN 1980). But see J.L. Brierly, *The Law of Nations* 417–20 (Oxford 6th ed 1963) (arguing that, taken as a whole, Article 51 was not intended to preclude acts of self-defense against acts that did not constitute an armed attack).

82 See, for example, Yoo, 71 U Chi L Rev at 740 (cited in note 8) ("The classic formulation of the right of anticipatory self-defense arose from the *Caroline* incident."). The *Caroline* doctrine of 1838 was established in a correspondence between the American Secretary of State, Daniel Webster, and a British representative, Lord Ashburton. Infuriated that the British had destroyed the U.S. ship *Caroline* for allegedly supplying and aiding the anti-British insurgents in Canada, Webster demanded that the British justify their claim that their action had been in self-defense. See Barry E. Carter and Phillip R. Trimble, *International Law* 1152–53 (Aspen 3d ed 1999).

83 Carter and Trimble, *International Law* at 1152–53 (cited in note 82).

84 Brierly, *The Law of Nations* at 420 (cited in note 81).

85 For example, Israel's air strike against Iraqi nuclear reactors was claimed to be an act of self-defense but was criticized on the grounds that it did not adequately meet the requirements of necessity and imminence—in other words, that it was too "anticipatory" in nature. See Resolution 487, UN Security Council, 2288th mtg (June 19, 1981), UN Doc S/RES/487, reprinted in 75 Am J Intl L 724 (1981). But see Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 Am J Intl L 584, 585–86, 588 (1983).

threatened to make Article 51 obsolete.[86] The customary "norm" that a state could legitimately use self-defense only "when an attack is so immediate and massive as to make it absurd to demand that the target state await the actual attack before taking defensive action"[87] was increasingly criticized as inadequate to address current realities.[88]

What might have remained a peripheral debate became concrete after September 11, 2001 and the U.S.'s subsequent announcement of its policy of preemptive self-defense.[89] It is argued that in this changed environment, when faced with the very real threat of rogue states and terrorists with devastating weapons at their disposal, the "United States and its allies may well have to rely exclusively upon their right to anticipatory self-defense."[90] In an effort to delineate the legal contours of such a right, several factors beyond temporality have been invoked "for determining whether a threat is sufficiently 'imminent' to render the use of force necessary at a particular point."[91] These factors—probability, magnitude of harm, and alternative recourses—not only can serve as appropriate measurements of the necessity of self-defense in the international arena, but also are apt tools to judge self-defense in the domestic arena.

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86 Franck, for example, has identified three main developments which alter the Article 51 self-defense calculus: (1) the "virtual tactical replacement of military aggression with surrogate warfare," which is "not the kind of traditional 'armed attack' against which the 'inherent right of individual or collective self-defense' was designed to provide protection"; (2) the "transformation of weaponry to instruments of overwhelming and instant destruction" so that "first strike capabilities [inevitably] begat a doctrine of 'anticipatory self-defense,' for which the literal text of the Charter made no provision"; and (3) the development of "a new ethos [that] had begun to . . . challenge[] traditional Westphalian notions of sovereignty." Franck, 5 Wash U J L & Policy at 57–58 (cited in note 77).

87 Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U Chi L Rev 113, 136 (1986).

88 Despite this criticism, as recently as 1996 the International Court of Justice released an advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ Rep 226, reaffirming the traditional standards of self-defense, and indicating that Article 51 and customary international law equally demanded that the requirements of necessity and proportionality be met. Id at 245.

89 *National Security Strategy* at 6 (cited in note 12) (noting that the U.S. will pursue a policy of defense "by identifying and destroying the threat before it reaches our borders"); White House Press Release, *Dr. Condoleezza Rice Discusses President's National Security Strategy* (Oct 1, 2002), online at http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html (visited Aug 23, 2004):

> [S]ome threats are so potentially catastrophic—and can arrive with so little warning, by means that are untraceable—that they cannot be contained [or deterred]. . . . And new technology requires new thinking about when a threat actually becomes "imminent." So as a matter of common sense, the United States must be prepared to take action, when necessary, before threats have fully materialized.

90 Yoo, 97 Am J Intl L at 575 (cited in note 8).

91 Id at 574 (calling for an approach that is "more nuanced than Secretary Webster's nineteenth-century formulation" in the *Caroline* doctrine).

III. COMPARISON OF INDIVIDUAL AND INTERNATIONAL SELF-DEFENSE

The abstract concept of justifiable self-defense can reasonably include actions that do not meet the traditional requirement of imminence. If acceptance of this observation can be contemplated in the international arena, individual self-defense law should also be reexamined. Although the practical repercussions of relaxing the imminence requirement might be different in the two contexts, the concept of self-defense in the abstract should be consistent. The desirability of symmetrical development can be illustrated by a comparison of international and domestic self-defense law on two levels: (1) the correlation of generally applicable principles of self-defense law, and (2) an analysis of the way in which specific anticipatory self-defense factors could justify preemptive actions in the face of both international and domestic violence threats.

A. Theoretical Comparison of International and Individual Self-Defense

The law of self-defense—in any context—is the legal authorization of the use of force to protect oneself from the unlawful aggression of another. Both domestic and international legal systems claim a monopoly on the use of force, where self-help is reserved to the individual or state only under very specific conditions. For example, while under U.S. domestic law it is unlawful for anyone to use force against another except in self-defense, in the international arena UN Article 2(4) prohibits "the threat or use of force,"[92] and subsequently conditions Article 51(1)'s right of self-defense on the Security Council's not yet having "taken measures necessary to maintain international peace and security."[93] These common authorizations of self-

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92 UN Charter Art 2(4).

93 Id Art 51(1). Although "the gist of self-defence is self-help," there are two points at which self-defensive action interacts with a supervisory power: prior to the use of force through third-party intervention; and after the use of force, when judgment is passed on its legality. Dinstein, *War, Aggression and Self-Defence* at 185–86 (cited in note 9). In the area of international law, Dinstein describes this as a two-step process. Although the first phase is left entirely "to the unfettered discretion of the victim State" due to the lack of an "effective international police force," the "second and final phase" requires "a competent international forum . . . to review the whole flow of events and to gauge the legality of the force employed," as was done by the International Military Tribunal at Nuremberg. Id. This was "one of the great achievements of the UN Charter . . . [as] Article 51 enables the Security Council to undertake a review of self-defence claims raised by Member States." Id at 186. The International Court of Justice is a second competent forum in which claims of self-defense are pled and can be judged (as in the *Nicaragua* case). Id at 186–87. Just as in individuals' domestic self-defense cases, an actor "using force in self-defence, in response to an armed attack, acts at its own discretion but also at its own risk," as the actor's decision to use force in self-defense may be deemed illegal at a later point. Id at 187.

defense are also circumscribed by the same requirements, as it is "universally acknowledged that the right of national defense is bounded by the same intrinsic limitations as the right of personal self-defense, namely, those of necessity, imminence, and proportionality."[94] A right to preemptive self-defense has traditionally not been included in the general right to self-defense in either context.[95]

That the requirements of self-defense are the same in both arenas is the product of the centuries-long practice of legal theorists using domestic law to develop a coherent doctrine of self-defense in international relations law.[96] As Yoram Dinstein has observed: "The legal notion of self-defence has its roots in interpersonal relations, and has been sanctified in domestic legal systems since time immemorial. From the dawn of international law, writers sought to apply this concept to inter-State relations."[97]

This conscious parallelism is justified by both principled and practical considerations. In principle, legal systems enact moral schemes that value life and thus set norms against aggression. To deter aggression, or punish it post hoc, requires assigning an entity responsibility for the aggression. In the international arena this necessitates the analogy between the state and the individual. For "[i]f states actually do possess rights more or less as individuals do, then it is possible to imagine a society among them more or less like the society of individuals."[98] This "comparison of international to civil order is crucial to the theory of aggression."[99]

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94 Rodin, *War and Self-Defense* at 110–11 (cited in note 79).

95 See, for example, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, 1986 ICJ 14, 103 ("[I]n the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack."); Fletcher, 57 U Pitt L Rev at 557 (cited in note 11):

> Preemptive strikes are illegal in international law as they are illegal internally in every legal system of the world. They are illegal because they are not based on a visible manifestation of aggression; they are grounded in a prediction of how the feared enemy is likely to behave in the future.

But see the dissent in *Nicaragua*, insisting that the case did not specifically decide the legality of anticipatory self-defense. 1986 ICJ at 347 (Schwebel dissenting) ("The Court rightly observes that the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised in this case, and that the Court accordingly expresses no view on that issue.").

96 See, for example, Walzer, *Just and Unjust Wars* at 58 (cited in note 79) (explaining the so-called "domestic analogy").

97 Dinstein, *War, Aggression and Self-Defence* at 160 (cited in note 9). During the period when theories of individual autonomy and responsibility were being developed, the state was theorized in a similar manner (and by the same theorists). See Alexander Wendt, *The State as Person in International Theory*, 30 Rev Intl Stud 289, 305 (2004) ("Prior to the twentieth century, many of the greatest political and social theorists of the day conceived of the state as an organism, including—in different forms—Hobbes, Kant, Hegel, Spencer, and Durkheim.").

98 Walzer, *Just and Unjust Wars* at 58.

99 Id.

Despite this history of joint development, it has recently been urged that states should be "freed of the notion that nations are subject to the same self-defense rules that apply to individuals," as "the rules governing individuals under the criminal law have no obvious application to nation-states interacting in a system of anarchy."[100] Yet just as individuals are treated as legally accountable entities by criminal law, states are treated as responsible entities in a variety of legal capacities: they sign treaties, enter into trade agreements, and form multistate organizations. If a state is in violation of any of those arrangements, it can be punished through economic or diplomatic sanctions, and occasionally through the use of international force.[101] If a state can be held responsible for its actions, including acts of aggression, its use of force can be limited to legitimate self-defense.[102] That the legitimacy of self-defense may be calibrated differently in the international arena than in the individual arena is to be expected, but contextual differences are not cause for conceptual despair. Although the different variables of self-defense may be assigned different weights in the international arena, they remain part of the same self-defense equation.[103]

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100 Yoo, 71 U Chi L Rev at 776 (cited in note 8).

101 For example, Yoo quoted Henry Kissinger as saying that "nations do not have friends, only interests." Id at 778. In contrast, Louis Henkin explained the concept of state "sovereignty" as consisting of norms of rights as well as responsibilities—much the way an individual's "sovereignty" is conceptualized. Louis Henkin, *Notes from the President: The Mythology of Sovereignty*, Am Socy Intl L Newsletter 6 (Mar–May 1993). He theorized a social contract element in relations between nations that allows for intervention and accountability when a state transgresses the accepted norms:

> Like all men (and women), all states are equal in status and rights (and duties). Like individuals, states have "personhood," "will," the ability to decide and to agree. States have rights (implying reciprocal duties). A state has the right to life, to continue to exist. It has the right to liberty and the pursuit of happiness, including internal autonomy, the right to be let alone (political independence) and a right to property (including territorial integrity). To secure these rights states enter a social contract, agreeing to be governed by norms and institutions. These derive their legitimacy from the consent of the governed.

Id.

102 Even in the *Caroline* correspondence, Webster explained his demand for a justification of self-defense by asserting that "a just right of *self-defense* attaches always to nations as well as to individuals, and is equally necessary for the *preservation* of both." Timothy Kearley, *Raising the* Caroline, 17 Wis Intl L J 325, 333 (1999) (internal citations omitted).

103 A self-defense calculation can be reduced to equation form, with each of the considerations as a variable assigned a particular value. For example, the various requirements of self-defense could be assigned values: I = imminence, P = probability, M = magnitude of harm, A = alternative recourses, and N = necessity. If the purpose of establishing requirements of self-defense is to limit its use to actions that are necessary (which is lessened when alternative recourses are available), a self-defense equation could be expressed thus: I + P + M = N – A. Although different values might be assigned to the variables depending on whether the situation to be judged took place on the individual or international level, the equation will nonetheless remain static: we will still be calculating the same self-defense equation. For a more thorough articulation of this concept, see Eric A. Posner and Alan O. Sykes, *Optimal War and* Jus Ad Bellum, Public

Furthermore, in both contexts the argument about anticipatory force centers on the requirement of imminence.[104] This requirement "distinguishes self-defense from the illegal use of force in two temporally related ways. A preemptive strike against a feared aggressor is illegal force used too soon; and retaliation against a successful aggressor is illegal force used too late."[105] Thus, to prevent unnecessary recourse to self-help, "[l]egitimate self-defense must be neither too soon nor too late."[106] This temporal component of "imminence" has been singled out as the primary obstacle to both preemptive action by states and the self-defense claims of some battered women.[107]

At this point, different responses to the obstacle of imminence have evolved in each context. While in the area of domestic violence the main tool that has been fashioned to address this issue is the battered woman syndrome, in the international context a set of criteria has been proposed to supplement the concept of temporal imminence. Because viewing battered women's experiences through a psychological prism has proven inapt in assisting their self-defense claims, consideration of the proposed objective factors from the international context may be helpful in the domestic violence context. This conceptual project is facilitated by several parallels between the contexts: an unresponsive and ineffective preventative legal regime, aggressors who are undeterred by legal punishment and with whom the intended victims are familiar, and the "magnitude" of the consequences of inaction.

B. Elements of Anticipatory Self-Defense: An International and Individual Comparison

Invigorated theories of anticipatory self-defense in the international arena have developed much in the same way that initial theories of self-defense developed: organically. That is to say, theorists have surveyed changes in circumstances and proposed criteria that set sen-

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Law and Legal Theory Working Paper No 63, online at http://papers.ssrn.com/id=546104 (visited Aug 23, 2004).

104 In neither scenario has there been a serious effort to advocate for unnecessary or disproportionate force. See, for example, Yoo, 97 Am J Intl L at 574 (cited in note 8) ("The use of force in anticipatory self-defense must [still] be necessary and proportional to the threat.").

105 Fletcher, *A Crime of Self-Defense* at 20 (cited in note 4).

106 Id.

107 See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 Harv J L & Pub Policy 539, 539 (2002) (arguing that a proposal to attack the launch sites of any state that threatened the U.S. with nuclear or biological weapons, while perhaps a good policy, would violate the imminence component of established international self-defense law); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am U L Rev 11, 31 (1986) (arguing that battered women who kill in self-defense should be viewed under the rubric of excuse, rather than justification, because "[j]ustification cannot be the proper theoretical basis for the acquittal if there was no actual imminent unlawful deadly aggression").

sible and acceptable parameters of behavior in light of the reality of threats, rather than "focusing myopically on temporal imminence."[108] Allocation of the risk of a mistaken calculation is, of course, a political judgment.[109] Simply articulating the relevant factors of probability, alternative recourses, and magnitude of harm does not determine judicial outcomes for particular cases. Self-defense "is a legal right, and as with other legal rights the question whether a specific state of facts warrants its exercise is a legal question."[110] Thus, when either an individual or a state actor claims to have acted in justified anticipatory self-defense, the available evidence must be assessed to determine whether each requirement was met. Although temporal imminence may remain a reliable indicator of whether self-defensive force is necessary, its attenuation should not be fatal to a self-defense claim when other factors—such as a high probability of the threatened aggression coming to pass, a lack of effective alternatives, and the magnitude of threatened harm—are present in imminence's stead.

1. Probability.

A critical factor is "the probability of an attack," which comprises "the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity."[111] This is the "function of two factors: capability and intention."[112] The probability criterion acknowledges two important principles. First, it incorporates the intuitive point of probability, which entails some assessment of risk based on past behavior. Past experience helps the threatened

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108 Yoo, 71 U Chi L Rev at 751 (cited in note 8). See also Glennon, 25 Harv J L & Pub Policy at 540 (cited in note 107) (positing a break between the old de jure laws of self-defense in international relations and the new de facto laws that are evolving in response to new pressures in the "real world"); Michael J. Glennon, *How War Left the Law Behind*, NY Times A33 (Nov 21, 2002) (arguing that with the Iraq war, the U.S. was acting in response to "the breakdown of international rules governing the use of force"); *In Bush's Words: On Iraq, UN Must Face Up to Its Founding Purpose*, NY Times A10 (Sept 13, 2002) (reprinting a speech in which Bush argued before the UN that "if we fail to act in the face of danger . . . an emboldened regime [could] supply [weapons of mass destruction] to terrorist allies, [and] then the attacks of Sept. 11 would be a prelude to far greater horrors"); Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, Weekly Standard 24 (Jan 28, 2002) (arguing that the Bush doctrine is a legitimate alternative to Article 51 of the UN Charter, which, Glennon argues, has come to impair self-defense in the international arena).

109 In the individual arena, when one says, "Preemptive self-defense cannot be allowed because we value life too much," what is being said is, "We value the potential aggressor's life too much," so that the potential victim bears the risk of being mistaken about the threat. In the international context, if one says, "We must be able to act preemptively because we value life too much," what is being said is, "We value the potential victim's life too much," so that the potential aggressor bears the risk of the victim being mistaken about a threat.

110 *Black's Law Dictionary* at 1390 (cited in note 10), quoting J.L. Brierly, *The Law of Nations* 319 (Clarendon 5th ed 1955), for the definition of self-defense under international law.

111 Yoo, 97 Am J Intl L at 574 (cited in note 8).

112 Yoo, 71 U Chi L Rev at 758.

party to determine more accurately whether a threat is presented.[113] Second, in accordance with common sense, if the threat is imminent in the sense of being permanent, the threatened party should be allowed to act when presented with a "window of opportunity," rather than allowing the aggressor to choose the exact time and manner of confrontation.[114]

Some critics of relaxing the requirement of imminence from "temporal proximity" to "probability"—much like the critics of battered woman syndrome—have pointed out the increased difficulty of distinguishing "true" claims of self-defense from actions with ulterior motives.[115] If an attack is ongoing (or obviously about to be launched), there is clear evidence that the self-defensive force is necessary. In response, advocates of the probability approach emphasize the value of alternative forms of evidence—that is, past experience[116] and evidence about current intentions and capacities.[117] They also consider that there may be limited "windows of opportunity" to act on that evidence.

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113 This can help to address the requirement that the "exercise of self defense must be based on adequate proof of responsibility." Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 Milit L Rev 89, 98 (1989).

114 This intuition was articulated in a recent Republican National Committee advertisement:

> "Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?" Some call for us to retreat, putting our national security in the hands of others. Call Congress Now. Tell them to support the President's policy of preemptive self-defense.

November 2003 Republican National Committee Advertisement (quoting President George W. Bush), online at http://slate.msn.com/id/2091666/sidebar/2091660 (visited Aug 23, 2004).

115 This concern about opportunism is well founded, since, as Brierly has pointed out:

> The need to keep self-defence within strict limits has been demonstrated very often in recent history; for, aggressive war having been designated an international crime, nearly every aggressive act is sought to be portrayed as an act of self-defence. The right of self-defence was pleaded at Nuremberg and Tokyo on behalf of the German and Japanese major war criminals and rejected by the War Crimes Tribunals.

Brierly, *Law of Nations* at 406 (cited in note 81). Other commentators have expressed concern that a liberally construed standard of self-defense could serve as a mask for military adventurism. See Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, in Antonio Cassese, ed, *The Current Legal Regulation of the Use of Force* 505, 515–16 (Martinus Nijhoff 1986). This has been a strand of criticism against the U.S. action in Iraq—that "evidentiary" claims have been substandard and ulterior motives have been at work. See Bob Thompson, *Preemptive Strike*, Wash Post W12 (July 27, 2003) (noting that even if Iraq's weapons of mass destruction are found, "it's now clear that the intelligence on which we based our attack is worthless. This is no small problem. 'If you're going to talk about preemption . . . you have to have some standard, some threshold of action.' If preemptors don't care about that, the precedent is 'terrifying'") (quoting former Foreign Service Officer John Brady Kiesling).

116 In the case of Iraq, Saddam Hussein's previous use of biological weapons, aggressive actions, and flagrant violation of international rules were offered as proof of future intentions. See Robert Kagan and William Kristol, *Why We Went to War*, 9 Weekly Standard 6 (Oct 20, 2003).

117 Again, in the case of Iraq, multiple offerings of intelligence to the international community were made, most notably in Secretary of State Colin Powell's presentation to the United Nations. Id. A post hoc legal judgment about anticipatory self-defensive force involves a subsequent

This proposed shift has been characterized as a move from the rulelike standard of temporal imminence to a more flexible standard of probability.[118] When behavioral parameters are set by rules, it is because it is believed that "the rule-creators . . . have better information and superior competence" to those who will "apply the rule in particular cases at a later time."[119] This is in contrast to the use of more flexible standards, where it is assumed that the rule-appliers will have better information and superior competence.[120]

This argument for privileging "special knowledge" about the potential attacker in the international arena is analogous to the arguments advanced in the domestic violence context. As one commentator explains, "[R]esearch shows that battered women tend to become hypersensitive to their abuser's behavior and to the signs that predict a beating," including changes in the abuser's behavior that may indicate that "this time he really was serious about carrying out his threats to kill."[121] Not only may this "enable battered women to recognize the imminence of an attack at a time when others without their prior experience would not," but the battered woman is also attuned to the fact that defending herself during a beating, or trying to escape the relationship, may escalate the violence, leaving her unable to defend herself or escape during a "window of opportunity."[122] In this situation, an approach based on the standard of probability accurately identifies

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independent assessment of such evidence, and the state's reasonableness in acting on that evidence.

118 See Yoo, 71 U Chi L Rev at 758–61 (cited in note 8). "Imminence" is not a "rule" in the way that "the speed limit is 55 mph" is a "rule." Imminence, strictly interpreted to mean "instantaneous or ongoing armed attack," is closer to a rule than simply saying that someone will arrive at his destination "imminently," meaning "in the next little while." Incorporating additional axes upon which to judge "imminence" has the effect of moving the concept away from its more rulelike "immediate" meaning and toward accommodating the standard of "probability" (which, in turn, can also be strictly interpreted). This assessment of probability and magnitude of harm could look more like a cost-benefit analysis than a strict standard of imminence. In traditional self-defense law this type of cost-benefit analysis tends to be located in assessments of "reasonableness." See George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 Am J Comp L 683, 698 (1998):

> [T]he term "reasonable" functions as a place holder for a range of values that are typically invoked to fine-tune legal rules by recognizing the peculiarities of every case. When we say you can use only reasonable force in self-defense, we imply that a variety of individual and social considerations can enter into a judgment that the defensive force has gone too far.... Lawyers in the common law tradition start with a single rule of reasonable force that signals all the variables of cost and benefit that the judge needs to know.

119 Adrian Vermeule, *Interpretive Choice*, 75 NYU L Rev 74, 93 (2000).

120 See id.

121 Kit Kinports, *Deconstructing the "Image" of the Battered Woman: So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 SLU Pub L Rev 155, 180 (2004).

122 Id at 180–82 (comparing battered women's plight to that of a kidnap victim seeking a "window of opportunity" to escape or kill her kidnapper).

the battered woman as having superior access to information than the ex ante rulemaker.

2. Alternatives.

Even if there is a high probability of an attack, there must still be an inquiry as to "whether diplomatic alternatives are practical."[123] This phrasing emphasizes not just whether diplomatic alternatives are available in theory (there are always more Security Council resolutions, inspections, and security measures to be taken), but whether they are likely to be effective (that is, practical). Criticism in the international arena has tended to focus on the limitations of any sort of enforcement mechanism to prevent violence committed by terrorists and rogue states.[124]

This element addresses the most controversial component of imminence: when can an actor "take the law into his own hands?"[125] In addition to pursuing procedural recourse to third parties and enforcement mechanisms,[126] the actor must do everything he reasonably

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123 Yoo, 97 Am J Intl L at 574 (cited in note 8).

124 This is in contrast to a possible criticism that there simply is "no international law," a path that has been resisted. For example, in an article that advocates the evolution of international self-defense law, Yoo first painstakingly details all of the procedural actions taken by the U.S. prior to the anticipatory self-defensive measure, and argues that those actions in and of themselves (without any of the anticipatory self-defense factors) legally authorized the use of force. Id at 564–72. There is a related impulse to discount the significance in this debate of the U.S.'s recourse to anticipatory self-defense since, it is argued, the U.S. cannot practically be held accountable for its actions. There are both practical and theoretical problems with this move. First, regardless of whether President Bush, or his administration, is ever tried in a criminal court, it is plausible that the U.S. will suffer political and economic sanctions for its behavior (some say the U.S. already is experiencing such fallout). Secondly, the existence of the law and the law's enforcement are two separate issues. On a basic theoretical level, it is unsound to argue that one did not behave illegally because he was not punished.

125 The primary source of the outcry against the U.S.'s "unilateral" action in Iraq was that economic and political sanctions, weapons inspectors, and continuing international pressure were all available—that is, anticipatory self-defense was not "necessary." This debate has been framed as one between unilateralism and multilateralism. See Thompson, *Preemptive Strike*, Wash Post at W12 (cited in note 115) (depicting the debate as between "the old school foreign policy internationalists" and "the go-it-alone, military-oriented policy makers who so decisively seized the initiative after the [September 11th] attacks"); Abdullahi Ahmed An-Na'im, *Is This a New Kind of War? September 11 and Its Aftermath* (Nov 2001), online at http://www.crimesofwar.org/expert/paradigm-annaim.html (visited Aug 23, 2004) ("The only rational and civilized thing to do . . . is for the attacks of September 11, their root causes, and their consequences, to be dealt with internationally and through the rule of law, instead of U.S. vigilante justice.").

126 It is imperative to understand that a third party's ability to intervene in the commission of violence, while analogous, is very different from the issue of the limits of self-defense. In the domestic violence context there has been much discussion as to what level of state intervention in the home is desirable or necessary to deal with domestic violence. See, for example, Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 Harv L Rev 550 (1999); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U Pa L Rev 2151 (1995). The theoretical basis of this discussion has been debate over the public/private distinction. See generally Fineman and Mykitiuk, eds, *The Public Nature of Private Violence* (cited in

can to secure himself without violence.[127] The importance of this element lies not just in a particular case, but also in its precedential value. Procedures and rules are the great equalizers: if the U.S. can take anticipatory action, how can that right be limited in others?[128]

The response to these questions must be to point out what practical procedural steps *were* taken, and their subsequent failure. Whether or not those steps were sufficient in any particular case does not make the conceptual inquiry any more or less valid as a standard for judgment. The outcome of this type of deliberation is a limiting factor in and of itself. The sufficiency of the U.S.'s interaction with the UN prior to its action against Iraq can be debated, but the resolution of that debate then provides a standard against which other actions can be judged. Furthermore, a state cannot be required to abstain entirely from dealing with threats to its security while it attempts to address the root causes of terrorism and rogue states—it must be a concurrent project. This may be especially true as "terrorist groups" or rogue

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note 44). The analogous discussion in international law is *not* about the law of self-defense, but the debate about intervention (usually humanitarian intervention) in conflicts that threaten to destabilize political relations through violence. See, for example, Loris Fisler Damrosch and David J. Scheffer, eds, *Law and Force in the New International Order* 111–237 (Westview 1991). The theoretical basis of this discussion has been debate over the concept of sovereignty. See Gene M. Lyons and Michael Mastanduno, eds, *Beyond Westphalia? State Sovereignty and International Intervention* (Johns Hopkins 1995). Both discussions engage the difficult questions of what level and type of outside intervention is acceptable and necessary due to internal levels of violence in family or state units that are traditionally deemed "private" or "sovereign." Although a comparison of the two strands of discussion might be fruitful, it is far beyond the scope of this Comment. More importantly, the ability of third-party intervenors to moderate violence, although inevitably noted, is not an appropriate standard to which to hold an individual or state actor when assessing the necessity of self-defensive action.

127 This is the equivalent of a "pre-retreat" rule applied to the international context: what did the state do to avoid the ultimate confrontation? Options can include anything from building a missile defense shield to installing permanently locked doors in airplane cockpits. When the focus is turned away from the actions of the potential aggressor and toward the steps that could be taken by the potential victim to secure itself, the debate deteriorates, because there is always something more that could be done. Furthermore, there is the related inquiry of what the U.S. did to create the conditions that would lead another state, or terrorists, to want to attack it. See, for example, Karl M. Meessen, *Unilateral Recourse to Military Force against Terrorist Attacks*, 28 Yale J Intl L 341, 343 (2003) (suggesting that before resorting to violence, "the political objectives of the terrorists and their sympathizers should be taken seriously").

128 See, for example, John Newhouse, *Imperial America: The Bush Assault on the World Order* 48–49 (Knopf 2003) (noting the possible implications of the Bush doctrine as applied by other nations in their own "hotspots," including between India and Pakistan and between the Israelis and Palestinians); Colin Joyce, *Japan Flexes Its Muscles, Thinking the Unthinkable*, Daily Telegraph 15 (Aug 9, 2003) (reporting that by summer 2003, Japanese officials were responding to North Korean nuclear plans by "promis[ing] pre-emptive air raids if it feels threatened," with one official declaring that "Japan had the right to carry out pre-emptive strikes if it was clear that the country was about to be struck by a missile"); Henry Kissinger, *Beyond Baghdad*, NY Post 24 (Aug 11, 2002) ("It is not in the American national interest to establish preemption as a universal principle available to every nation.").

states "are motivated by extreme religious or political beliefs that render them immune to diplomacy or deterrence."[129]

In the battered woman context, many of the same issues arise. Law enforcement that is meant to provide protection has proven generally ineffective. Alternative recourses, such as enrolling batterers in anger management programs, have thus far shown little to no success.[130] Restraining orders, although sometimes effective, do not deter batterers who are determined to harm or kill their wives or girlfriends.[131] The women who escape the relationships and move to different states, change their names, and go into hiding have no "witness protection" program, and many of their batterers successfully hunt them down.[132] For the few women who kill their batterers before their batterers kill them, an explicit acknowledgment of their lack of meaningful alternatives in assessing their self-defense claims is imperative.

3. Harm.

The standard also demands an assessment of "the magnitude of the harm that could result from the threat."[133] Specifically, "in an age of

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129 Yoo, 71 U Chi L Rev at 734 (cited in note 8). Although Meessen asserts that, "[s]ociety-induced terrorism can only be overcome by persuading terrorists to desist from causing indiscriminate casualties," he also acknowledges that "[t]errorists, however, tend to be rather dogged." 28 Yale J Intl L at 343 (cited in note 127).

130 See National Institute of Justice, *Do Batterer Intervention Programs Work? Two Studies* 2 (Sept 3, 2003), online at http://www.ncjrs.org/pdffiles1/nij/200331.pdf (visited Aug 23, 2004) ("Attending the program had no effect on the incidence of physical violence."). Some of the methodological obstacles to studying the effectiveness of batterers' programs include the fact that "batterers drop out at high rates" and "victims often relocate or become difficult to find." Id at ii. The latter problem refers to the fact that battered women often go into hiding, and whether or not another "incident" occurs will depend on a batterer's success in hunting the woman down or getting into another relationship—both difficult outcomes for the studies to track.

131 Legal declarations such as restraining orders, much like Security Counsel resolutions and treaties, have only the force given them by those against whom they are directed. For example, one study indicated that, of 321 domestic fatalities, 47 were suicides within homicide-suicide incidents. See Byron Johnson, De Li, and Neil Websdale, *Florida Mortality Review Project: Executive Summary*, in *Legal Interventions in Family Violence: Research Findings and Policy Implications* 40 (National Institute of Justice July 1998), online at http://www.ncjrs.org/pdffiles/171666.pdf. As many batterers kill themselves along with their intimates, they are in some important ways analogous to "suicide bombers" and tend to be fairly unreceptive to restraining orders or batterer intervention programs. See also Adele Harrell and Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in Eve S. Buzawa and Carl G. Buzawa, eds, *Do Arrests and Restraining Orders Work?* 214, 223–24 (Sage 1996) (noting that 60 percent of women in one study reported acts of abuse after the entry of a protection order, and 30 percent reported acts of severe violence).

132 See Shawn D. Haley and Ellie Braun-Haley, *War on the Home Front: An Examination of Wife Abuse* 151–87 (Berghahn 2000) (describing efforts to remain in hiding, such as not opening bank accounts or credit cards, not filing for divorce or name changes, and making multiple moves, as well as the corresponding efforts by the batterers to locate the women, including the enlistment of detective agencies and the harassment of family members and friends left behind).

133 Yoo, 97 Am J Intl L at 574 (cited in note 8).

technologically advanced delivery systems and [weapons of mass destruction], international law cannot require that we ignore the potential harm represented by the threat."[134] Critics argue that the magnitude of harm can be assessed in two directions: if there is mistaken inaction, U.S. civilian lives will be lost; if there is mistaken use of force, other countries' civilian and military lives will be lost. There must be a choice about which party bears the risk. Even theorists who oppose anticipatory self-defense acknowledge this dilemma. Dinstein concedes, "It would be absurd to require that the defending State should sustain and absorb a devastating (perhaps a fatal) blow, only to prove an immaculate conception of self-defence."[135] A further consideration might be that "the situation of a people living under the constant threat of a recurrence of 9/11-type events falls short of survival in human dignity."[136]

Building upon the preceding two factors, the appropriate allocation of the risk of mistake has been described thus:

> If a state has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike, preemptive use of force is justified. Admittedly, that line is not bright. Mistakes may be made. It is better, however, that the price of those mistakes be paid by states that so posture themselves than by innocent states asked patiently to await slaughter.[137]

The argument in the international arena relies on the devastation that could ensue due to inaction. In the domestic violence context, it is generally only a single woman who is killed, perhaps with her children or other family members.[138] When the harm is assessed in the other direction, however, the mistaken use of anticipatory self-defense typi-

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134 Id.

135 Dinstein, *War, Aggression and Self-Defence* at 172 (cited in note 9). For example, Dinstein approves of Israel's actions during the Six Days War of 1967 despite noting that "notwithstanding the well-founded contemporaneous appraisal of events—the situation may have been less desperate than it appeared." Id at 173. He claims that the hindsight analysis is "immaterial." Id. Once Dinstein is willing to sanction a predictive action that may actually have been incorrect, it is hard to distinguish that situation from anticipatory force, given a heavier emphasis on degree of proof prior to attack.

136 Meessen, 28 Yale J Intl L at 349 (cited in note 127).

137 Glennon, 25 Harv J L & Pub Policy at 552–53 (cited in note 107).

138 Note that the magnitude of violence is affected dramatically by perception. Taken as a whole, batterers kill thousands of women and children every year, in numbers comparable to the number of lives taken by the September 11th hijackers. See Leonard, *Convicted Survivors* at 8–9 (cited in note 57) (recounting estimates of women who are killed by intimates as ranging from 1,000 to 4,000 per year).

cally results in the death of one batterer. Thus, the relative order of magnitude is the same in both situations.[139]

It also seems sensible to take some notion of "human dignity" into account when holding a defendant responsible for allocating the risk of future harm. Living in constant fear of being battered, possibly to death, in order to preserve an aggressor's life denies the victim of terror her "human dignity." It may thus be appropriate to shift the risk to the party whose aggression has created the situation.

IV. APPLICATION OF INTERNATIONAL ANTICIPATORY SELF-DEFENSE FACTORS TO *STATE V NORMAN*

It is useful to bring the theory into dialogue with an actual case of a battered woman denied a self-defense instruction. The majority of battered women's cases where imminence is at issue involve contemporaneous confrontations; specifying what is meant by imminence in those cases should be relatively straightforward. The true application challenge is in the more difficult—if less frequent—cases of self-defense in situations not objectively understood as confrontational. Thus, it is useful to apply the above factors to a paradigmatic case in domestic violence law of a battered woman being denied a self-defense instruction after killing her sleeping husband: *State v Norman*.[140] The controversy surrounding the case centered primarily on the court's finding that:

> [t]he evidence in this case did not tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm. The evidence tended to show that no harm was "imminent" or about to happen to the defendant when she shot her husband.[141]

While some decried the outcome, others concluded that the court had avoided allowing a hard case to make bad law. For despite the "temptation . . . to think that the oppressed and battered woman should take the law into her own hands," especially as "Judy Norman's appeals to the authorities went unheeded," she still should not legitimately "put

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139 This element overlaps to some extent with another requirement of self-defense law: proportionality. It is not proposed that justifiable self-defense killings are acceptable in any situation outside of a fear of death or great bodily harm. Thus, if the feared magnitude of harm falls short of that standard, force (whether preemptive or not) will remain illegal. See, for example, *Hoyt v Florida*, 368 US 57 (1961), in which a woman beat her husband to death with a baseball bat after a period of "marital upheaval" in which he had cheated on her and refused to reconcile. If there is no threat of death or serious bodily injury, the definition of imminence will be irrelevant, as the force will be "unnecessary."

140 324 NC 253, 378 SE2d 8, 9 (1989) ("We conclude that the evidence introduced in this case would not support . . . jury instructions concerning either perfect or imperfect self-defense.").

141 Id at 13.

herself in the position of judge and executioner."[142] But a competing story can be told. The factors outlined above offer insight into this situation, without requiring recourse to diagnosing Judy Norman as suffering from the mental illness of battered woman syndrome.

Thus, by explicitly addressing the factors that informed the concept of imminence in *Norman* and evaluating measurements of necessity beyond temporality of threat, Judy's actions look less like a retaliatory strike or an "easy" way out of the relationship, and more like justified anticipatory self-defense.

A. Probability

The facts of Judy Norman's case strongly supported a court's affirmative evaluation of "the probability of an attack," including "the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity."[143] In the Normans' twenty-five-year marriage, Judy suffered constant, humiliating, and physically debilitating abuse, often inflicted in days-long sessions.[144] The threat presented by Judy's husband was very much "imminent" in the sense of being "permanent": her assessment of risk based on past experience constituted a solid basis for a finding of probability.[145]

Furthermore, to address the probability of an "increasing" threat, Judy offered evidence that during the last three days of her husband's life his "anger was exhibited in an unprecedented crescendo of violence."[146] He had forbidden her to eat for several days, continuously beaten her (despite two visits from law enforcement and Judy's attempted suicide), and told her that when he woke up he was taking her to the truck stop to prostitute—an activity always accompanied by severe beatings. As Judy testified, "I knowed when he woke up, it was going to be the same thing, and I was scared when he took me to the truck stop that night it was going to be worse than he had ever been."[147] In light of these facts, Judy had more than adequate past ex-

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142 Fletcher, 57 U Pitt L Rev at 556 (cited in note 11).

143 Yoo, 97 Am J Intl L at 574 (cited in note 8).

144 Judy's abuse included "frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her[,] . . . putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face." Her husband prostituted her, beating her after she "worked" for the day; he forced her to eat her food out of dog bowls and bark, and sleep on the floor. *Norman*, 378 SE2d at 10.

145 This requirement should actually be far easier to meet in the individual standard than in the international arena, for in the international arena it is much more likely that there will be intelligence or national security concerns about laying out gathered evidence for public inspection.

146 Id at 19 (Martin dissenting).

147 Id at 11 (majority).

perience to assess the need for self-defensive force and acted upon the small window of opportunity with which she was presented.[148]

B. Alternatives

Much of the court's reasoning centered on the fact that Judy Norman had options other than shooting her husband. The court pointed out:

> [Any other] result in principle could not be limited to a few cases decided on evidence as poignant as this. The relaxed requirements [proposed] for self-defense . . . would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem.[149]

This argument illustrates that, regardless of what the law says, some form of "pre-retreat" analysis takes place. It is better to address it directly, rather than through a theory of "learned helplessness" that fails to credit the innumerable times that Judy Norman sought outside help. Whether statutorily or through jury instructions, the inquiry must address whether a "pre-retreat" rule is appropriate and must consider the practicality of the alternatives.[150]

In Judy's case, because of her failed experiences with social service agencies and the law, and the "inefficacy of their protection and the strength of her husband's wrath when they failed,"[151] she was convinced of the impossibility of escape. Indeed, witnesses testified on her behalf that they "believe[d] escape was impossible."[152] Judy had tried to run away on multiple occasions. Each time her husband found her, dragged her back, and severely beat her. In the final three-day escala-

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148 In contrast, this line of inquiry would prove unhelpful in a number of domestic violence situations where the abusive history is abbreviated, and the final confrontation more unexpected. This problem would also arise in the "alternative recourse" inquiry, since out of the three to four women that are killed every day in the United States by an intimate, many are ambushed and killed prior to *any* police contact. Callie Marie Rennison, *Bureau of Justices Statistics: Intimate Partner Violence, 1993–2001* 2 (DOJ Feb 2003). This should not present a serious obstacle to a self-defense theory, however, as it is only very rarely that the woman is able to kill the batterer first, and thus required to stand trial.

149 *Norman*, 378 SE2d at 15.

150 For example, to point out that the woman had not yet enrolled her batterer in anger management counseling would be an improper, if not offensive, factual element to import into the conceptual standard. By all accounts, batterer programs have little to no success. See notes 130–31 and accompanying text.

151 *Norman*, 378 SE2d at 18 (Martin dissenting).

152 Id.

tion period preceding his death, police had been called to their house twice, and Judy had attempted suicide.[153] If we accept that the legal system has a limited ability to protect individuals,[154] a realistic inquiry must assess the batterer's receptivity to deterrence by the procedural steps that are available and actually pursued. Not only were the available alternatives likely to fail, but Judy Norman nonetheless appeared to have made good-faith attempts to utilize other avenues over the twenty-five years of abuse before killing her husband.

C. Harm

In Judy's case, there was no question about the magnitude of harm she would face when her husband awoke. Forced prostitution, rape, severe beatings, and possible death were what she was promised—all forms of harm well within the traditional protections of self-defense law. In such a situation, to "require the battered person to await a blatant, deadly assault before she can act in defense of herself would not only ignore unpleasant reality, but would amount to sentencing her to murder by installment."[155]

CONCLUSION

As the *Norman* court explained, the "killing of another human being is the most extreme recourse to our inherent right of self-preservation and can be justified in law only by the utmost real or apparent necessity brought about by the decedent."[156] At this point, the best that has been done to include women's experiences in the law of self-defense has been to offer the potential inclusion of evidence that their actions can be explained by a syndrome. The legal system has steadfastly refused to reconsider the traditional requirements of self-defense. In contrast, as new threats have emerged in the international arena, not only have there been serious discussions about the appropriate use of anticipatory self-defense, but the United States has adopted just such a policy. It is "[s]hatteringly and indelibly clear . . . that the losses of September 11 are real to power in a way that women's extermination and terror by men have never been."[157]

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153 Id at 19 (noting that in the wake of the attempted suicide, Judy's husband attempted to interfere with the paramedics, saying "Let the bitch die," and had to be chased back into the house). This Comment does not advocate that attempted suicide be a prerequisite for a showing that a battered woman had exhausted all alternatives (although the requirement could be met in a large number of cases), but surely it sheds light on the reality that the woman had run out of "alternative diplomatic means."

154 See notes 130–31.

155 *State v Gallegos*, 104 NM 247, 719 P2d 1268, 1271 (1986) (internal citations omitted).

156 378 SE2d at 13.

157 Catharine A. MacKinnon, *State of Emergency: Who Will Declare War on Terrorism*

If the factors outlined in the international arena to supplement the requirements of self-defense when temporal imminence is attenuated were implemented in cases of battered women who kill in self-defense, assessment of their actions could be disconnected from a diagnosis of mental illness, addressed in a more forthright and objective manner, and incorporated within the law of self-defense. These factors are not exhaustive, and others might capture different aspects of domestic violence. But they should trigger a more frank discussion about what values the law of self-defense uses to measure necessity, and challenge the fact that under the current law, some people seem to have a more "inherent right of self-defense" than others.

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against Women?, Women's Review of Books 7, 8 (March 2002). Another commentator has also highlighted this discrepancy, proposing that countywide Departments of Home Security be created to overhaul the currently ineffective legal system's responses to domestic violence. Mary Becker, *Access to Justice for Battered Women*, 12 Wash U J L & Policy 63, 93 (2003):

> After identifying the involvement of many bureaucracies as a major problem in the war on terror, the federal government responded by creating a Department of Homeland Security. The Department has general responsibility for anti-terrorism efforts and the ability to call on any agency for information or cooperation when appropriate. In the war on the most common type of domestic terror, domestic violence, there is a similar need. Each county needs to establish a Department of Home Security that is authorized to oversee the effectiveness of the local domestic violence response system and to collect the data needed to assess effectiveness.

VOLUME 71
2004

PUBLISHED WINTER, SPRING, SUMMER, AND FALL 2004
BY THE UNIVERSITY OF CHICAGO, THE LAW SCHOOL

CHICAGO, ILLINOIS, U.S.A.

The University of Chicago Law Review

Volume 71 2004